Supreme Court, U. S.
FILED
NOV 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-721

ALPHONSE VITELLO,
Claimant-Appellant,

-against-

THE STATE OF NEW YORK,
Respondent.

On Appeal From A Judgment Of The Court Of Claims Of The State Of New York Entered Upon An Order Of The Court Of Appeals Of The State Of New York

---

JURISDICTIONAL STATEMENT

GEORGE V. O'HAIRE
Attorney for Appellant
129 Newbridge Road
Hicksville, N.Y. 11801
(516) 933-7500

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

	Page
Jurisdiction Statement	1
Opinion Below	2
Jurisdiction	2
Question Presented	3
Statement of the Case	3
Conclusion	11

Appendices:

A—Memorandum of Court of Appeals, State of New York	1a
B—Remittitur	3a
C—Judgment of Court of Claims: State of New York	4a
D—Decision of the Appellate Division	6a
E—Order of the Appellate Division Appealed From	9a
F—Judgment of Court of Claims—State of New York	11a
G—Decision of State of New York, Court of Claims	13a
H—Judgment of State of New York Court of Claims	28a
I—Notice of Appeal to ~~Court of Claims, State of New York~~ UNITED STATES Supreme Court	30a

Cases Cited:

Baxstrom v. Herold, 383 U.S. 109 4

Coates v. City of Cincinnati, 402 U.S. 611, 615 10

Cohen v. California, 403 U.S. 15, 24-26 10

Covington v. Harris, 136 U.S. App. D.C. 35, 419 F.2d 617, 625 5

Dennison v. State of N.Y., 28 A.D. 2d 608 affd. 23 N.Y.2d 986, cert. den. 397 U.S. 923 3

In re De Stefinis Will, 250 App. Div. 253, 294 N.Y.S. 624 9

Jackson v. Indiana, 406 U.S. 717, 731, 92 S.Ct. 1845 .. 7

Kesselbrenner v. Anonymous, 33 N.Y. 2d 167 4

Matter of Ellergy C., 32 N.Y.2d 588, 591, 347 N.Y.S.2d 51, 300 N.E.2d 424 5

Neely v. Hogan, 62 Misc. 2d 1056, 1060, 310 N.Y.S. 2d 63, 67 7

O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed. 396 3

People v. Timothy Silver, 33 N.Y.2d 475 9

Rouse v. Cameron, 125 U.S.App. D.C. 366, 373 F.2d 451, 453 5

St. George v. State of New York, 283 App. Div. 245, affd. 308 N.Y. 681 10

Street v. New York, 394 U.S. 576, 592 11

Taig v. State of New York, 19 A.D. 2d 182 10

Trust Co. of Am. as Committee of a Stephant v. State Safe Deposit Co., 109 App. Div. 665, 96 N.Y.S. 585 9

United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 11

United States of America ex rel. Roy Schuster v. Len J. Vincent, Warden Green Haven, 410 F.2d 471 7

Other Authorities:

42 USC sec. 1983 3

Mental Hygiene Law, Secs. 15.01, 15.03, 15.05 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No.

ALPHONSE VITELLO,

Claimant-Appellant,

-against-

THE STATE OF NEW YORK

Respondent

On Appeal from a Judgment of the Court of Claims of the State of New York Entered Upon an Order of the Court of Appeals of the State of New York.

Jurisdictional Statement

Appellant Alphonse Vitello appeals from a judgment of the Court of Claims of the State of New York, entered upon an order of the Court of Appeals, State of New York, on September 10, 1976, affirming an order of the Appellate Division Third Department which reversed the judgment of the Court of Claims, State of New York, which had awarded Alphonse Vitello the sum of $100,000 on his claim for violation of his constitutional and civil rights as a result of his unlawful detention in Dannemora State Hospital for the criminal insane from February 21, 1940 to May 20,

1966. This sum also included "consideration to the degradation, indignities, humiliation, frustration and deprivation claimant suffered by reason of this false imprisonment."

Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Appeals of the State of New York is reported at 39 N.Y. 2d 847, and is set forth in Appendix A *infra* p. 1a. The Appellate Division reversed the Court of Claims and its opinion is reported at 48 A.D. 2d 956, 369 N.Y.S. 2d 229 and is set forth in appendix D *infra*. The opinion of the Court of Claims is set forth in appendix G, *infra*.

JURISDICTION

On June 18, 1935 claimant pled guilty to attempted robbery and received a five year sentence. During this term he had an emotional storm and was transferred to Dannemore State Hospital (a prison hospital) under an insanity law that had already been repealed. On December 27, 1938 a county judge signed an order that dispensed with personal service upon Mr. Vitello and ordered him to be committed to Dannemore State Hospital. The Court of Claims held that this order had no legal effect to retain Mr. Vitello, on January 4, 1961 some 21 years after Mr. Vitello's claim had expired another order was obtained that was also void and could not in any way legalize Mr. Vitello's confinement in Dannemore. The Court of Claims awarded Mr. Vitello for 26 years of false imprisonment $100,000 for all damages. This included the violation of the constitutional and civil rights of Mr. Vitello. The Appellate Division reversed and dismissed the claim and the Court of

Appeals affirmed, with the comment "appellant failed to establish, as is necessary for a recovery, that he was sane at the time of his original commitment to Dannemore State Hospital or that he recovered his sanity at any time during his subsequent 22-year stay (*Dennison v. State of New York*, 28 A.D.2d 608 affd. 23 N.Y.2d 986, cert. den. 397 U.S. 923)."

The appeal to this court lies from a final judgment entered upon a decision of the Court of Appeals of the State of New York where a question of illegal confinement in a prison hospital was a violation of the "alleged" insane persons rights under the constitution and civil rights law 42 U.S.C. §1983 as defined by this court in *O'Connor v. Donaldson* 422 U.S. 563, 95 S. Ct. 2486, 45 L.Ed. 396.

QUESTION PRESENTED

Does the fact that Mr. Vitello was presumed insane (in violation of the basic element of law that there is a presumption that a person is sane) deprived Mr. Vitello of his right to damages for 26 years of confinement in a hospital for criminal insane where he received no medical or psychiatric care, under court orders that the Court of Claims found to be void and of no legal effect?

STATEMENT OF THE CASE

That on June 18, 1935 claimant pled guilty to attempted robbery and received a five-year sentence to Sing Sing Prison. He was eventually transferred to Great Meadow Prison where he had "an emotional storm." Based upon this incident and without a proper diagnosis, he was transferred to Dannemore State Hospital on April 17th, 1937. He remained in this hospital for the next 29 years in a horrible environment of degradation where he was treated with callous indifference, disregard and neglect. During this entire period no proper medical evaluation was made of his condition and no attempt was made to treat him. In

fact, in all 29 years only one staff conference was held in his behalf. Actually, he would still be in said hospital except that the United States Supreme Court handed down the decision of *Baxstrom v. Herold* (383 U.S. 109) and based on same he was transferred to a civil hospital, where after a reasonable time he was to recover from the horrors of his 29 years, he was released as cured.

The reason for this confinement was that the doctors of said hospital without conscience obtained an order for his confinement, before his release and under a repealed law which order did not even reveal that claimant was already confined. A later order was subsequently obtained which also was void on its face.

On the trial, claimant's counsel, without serious opposition, proved that the State's doctor deviated from accepted psychiatric practices and therefore they never were in a position to judge whether claimant was insane and it was further disclosed that there was a failure to treat claimant. Nevertheless, the Court of Claims ignored these points and made no finding thereon. (The Appellate Division held this point was missing from Vitello's brief although the opposite was the truth). Instead, it found that claimant did not prove he was sane (the court disregarded the legal presumption of sanity) and then awarded him a mere $100,000 for all damages. The Appellate Division reversed and dismissed and the Court of Appeals affirmed on the ground that Mr. Vitello never proved that he was sane or had recovered his sanity.

Nevertheless, a previous opinion of the New York Court of Appeals contained the following in the case of *Kesselbrenner v. Anonymous*, 33 N.Y. 2d 167:

> "The principle enunciated in *Jackson* points the conclusion here. The appellant is mentally ill, albeit dangerously so, but he is not a criminal and has never been involved in a criminal proceeding. His confinement is necessary for the protection of

> others but, to be constitutional, it must be therapeutic, not punitive. How egregious a placement in Matteawan would be is readily apparent from a consideration of the probable reaction of the appellant—whose mental health has not become stabilized but whose response to medication and sympathetic and concerned treatment has been favorable—upon confrontation with a correction officer trained to deal with a prison population. And if, despite this, the appellant did recover, he would be subject in the meantime to the hazard of "emerging from his incarceration", as this court has observed in a not unrelated context, "well tutored in the ways of crime." (*Matter of Ellery C.*, 32 N.Y.2d 588, 591, 347 N.Y.S.2d 51, 300 N.E.2d 424). No "reasonable relation" exists between so harsh a confinement and the purpose sought to be achieved.
>
> "Only confinement in a hospital under the jurisdiction of the Department of Mental Hygiene, then, is suitable; incarceration in a penal, security-oriented facility such as Matteawan would be wholly incompatible with, indeed destructive of, this purpose. A comparison of the differences in purpose and treatment between the two types of institutions makes this abundantly clear.
>
> "By provisions of Constitution and statute (N.Y. Const., art. XVII, §4; new Mental Hygiene Law, §1.03 et seq.; cf., also, *Covington v. Harris*, 136 U.S.App. D.C. 35, 419 F.2d 617, 625; *Rouse v. Cameron*, 125 U.S.App. D.C. 366, 373 F.2d 451, 453; Morris, The Confusion of the Confinement Syndrome, 17 Buffalo L. Rev. 651, 679), the State is responsible for the 'care, treatment, rehabilitation, education, and training of the mentally ill". State hospitals, under the

jurisdiction of the Department of Mental Hygiene, are required to furnish these services at a cost determined by ability to pay (new Mental Hygiene Law, §7.05, subd. [a]; §§ 7.15, 9.03, 43.01), and the department is charged with seeing that "personal and civil rights of persons receiving care and treatment are adequately protected" (new Mental Hygiene Law, §7.05, subd. [c]). Accordingly, great freedom is afforded civilly committed patients, wherever possible, in the matter of correspondence, visitors and access to the Mental Health Information Service; home visits, when feasible, are authorized and encouraged (new Mental Hygiene Law, §§15.01, 15.03, 15.05; 14 NYCRR Part 21).

"Matteawan, in sharp contrast, is a correctional facility maintained by the Department of Correction for the primary purpose of "holding in custody and caring for such mentally ill persons held under any other than a civil process as may be committed to the department by courts of criminal jurisdiction' (Correction Law, §400). Although originally conceived as 'something less than a prison but more than a hospital,' Matteawan has been 'allowed to falter' and to 'drift into decline as a pioneer mental hospital and into constantly improved status as a security institution' (Mental Illness, Due Process and the Criminal Defendant—A Second Report, and Additional Recommendations by the Special Committee on the Study of Commitment Procedures and the Law Relating to Incompetents of the Association of the Bar of the City of New York [1968], p. 63). It has become increasingly devoted only to mentally ill convicted criminals (cf. e. g., CPL 730.50 subd. 1; CPL 730.60, subd. 1; Correction Law, §409), who, however much they may be entitled to psychiatric

assistance, are, nevertheless, serving out their prison terms. It has been characterized by more than one court and commentator in such terms as a 'maximum security institution', 'no different from a jail', imposing restrictions not applicable to civil patients. 'There is no freedom of movement. Patients are always under strict supervision. They are confined to wards which are locked; they have no access to the outside. They are not permitted to visit their homes. They cannot look forward to convalescent care.' (Katz, Goldstein and Dershowitz, Psychoanalysis, Psychiatry and Law [1967], pp. 696-697; see, also, *Neely v. Hogan*, 62 Misc. 2d 1056, 1060, 310 N.Y.S.2d 63, 67; Morris, Treatment of Mentally Ill "Non-Criminal Criminals" in New York, 18 Buffalo L.Rev. 393, 418; cf. *Jackson v. Indiana*, 406 U.S. 717, 731, 92 S.Ct. 1845, *supra; Baxstrom v. Herold*, 383 U.S. 107, 113-114, 86 S.Ct. 760, 15 L.Ed.2d 620). Correspondence, visitors and access to the Mental Health Information Service are much more limited than for mentally ill civil patients (Correction Law, § 413)."

The references made in the above decision to "Matteawan" could be the same as to "Dannemore" State Hospital where his care was custodial and not medical.

We can best set forth our position by setting forth part of the opinion in the very recent decision in the case of *United States of America ex rel. Roy Schuster v. Len J. Vincent, Warden, Green Haven*, 410 F.2d 471, where the opinion of Kaufman, C.J. (2nd Circuit), contained the following:

> " * * *. Moreover, the State does not contend that Schuster made a rapid recovery immediately prior to 1972 or 1967 or, indeed, that his condition changed at all during his three decades at Dannemora. Since Schuster received no treatment, 410 F.2d at 1076, 'improvement' would be highly

unlikely—especially in view of the undisputed tendency of prolonged confinement in a mental hospital to exacerbate rather than alleviate any pre-existing condition. See Wexler, *The Administration of Psychiatric Justice,* 13 Ariz. L.Rev. 1, 118 (1971); Rosenhan, *On Being Sane in Isane Places,* 179 Science 250, 254-57 (1973); Bhaskaran & Dhawan, *A Comparison of the Effects of Hospitalisation on Long-Say and Recently Admitted Female Schizophrenic Patients,* 20 Int'l J. Soc. Psychiat. 72 (1974).

Commitment to a mental institution of one who—like Schuster—posed no danger to himself or others, received no treatment, and was not incapable of safely surviving outside of a mental hospital—was recently held unconstitutional by the Supreme Court. *O'Connor v. Donaldson,* 422 U.S.—(1975). * * *"

In spite of Mr. Vitello's long confinement in Dannemora the following findings appear in the decision of the Court of Claims:

> "On April 13, 1966 claimant was transferred under commitment to Central Islip Hospital. On May 20, 1966 claimant signed an application for voluntary hospitalization. On December 1, 1966 an honor card was issued to claimant and overnight visits with his family were approved. He visited his home on several occasions between December 1, 1966 and May 11, 1967 when he was discharged."

The finding of the Court of Claims as to sanity was as follows:

> "On the proof before me, claimant has not established that he was sane during that period. Claimant, in this regard, has failed to sustain the burden of proof."

This certainly violated the basic element of law that there

is a presumption that a person is sane (see *People v. Timothy Silver,* 33 N.Y.2d 475). The certificate of a physician that is a person is insane is not and of itself a determination of incompetency.

Trust Co. of Am. as Committee of a Stephant v. State Safe Deposit Co., 109 App. Div. 665, 96 N.Y.S. 585; *In re De Stefinis Will,* 250 App. Div. 253, 294 N.Y.S. 624.

The New York State Court of Appeals in affirming the order of the Appellate Division gave as its authority the case of *Dennison v. State* 28 App. Div. 2d 608, aff'd 23 N.Y. 2d 996 cert. denied 397 U.S. 923. That this case is wide if the mark can best be seen by setting forth part of the memoranda opinion of the Appellate Division, Third Department.

> "* * * We find such proof irrelevant in the present case, initially at least in regard to proximate cause following the failure to give notice, for under the then existing section 384 of the Correction Law, the court did not have authority to direct claimant's transfer to a civil mental hospital. Its only power was to approve or disapprove the application for retention at Dannemora. If notice affording due process had been given and the court had become satisfied that the prisoner was insane, as he quite evidently was, its only choice would have been to approve the application for retention at Dannemora. But in any event there is no evidence of any substance that at that time or at any time thereafter claimant's condition would have been cured or substantially improved by his transfer to a civil hospital or by his discharge and we are constrained to find conjectural merely the proof upon which the award rests. It is to be noted that under section 385 of the Correction Law, as it read in 1936, the Commissioner of Mental Hygiene could have directed claimant's transfer to a civil hospital. Such

discretionary procedure, however, had nothing whatsoever to do with the section 384 proceedings. In conclusion, we would emphasize claimant's theory of damage and the question of medical judgment which seems to us its necessary predicate. In his brief, claimant denies that the issue is whether or not the was insane, and asserts, rather, that the question is whether, "even if he was insane * * * he was damaged, rather than helped" by commitment to Dannemora State Hospital, rather than to a hospital under the direction of the Department of Mental Hygiene. In view of the undoubted discretionary right that the appropriate State authorities possessed to discharge, parole or transfer claimant, should either course have been advisable, the most that can be predicated on their omission to act is a contention that the State's physicians were guilty of errors of professional judgment, if claimant's medical proof be credited. Errors of that nature do not, however, cast liability upon the State. (*St. George v. State of New York*, 283 App. Div. 245, affd. 308 N.Y. 681; *Taig v. State of New York*, 19 A.D. 2d 182.) * * *"

We think that the following quotation in the opinion of Mr. Justice Stewart in the case of *O'Connor v. Donalson, supra*, clearly shows the extent to which Mr. Vitello was deprived of his constitutional rights:

> "May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. See, *e.g., Cohen v. California*, 403 U.S. 15, 24-26; *Coates v. City of Cincinnati*; 402 U.S. 611, 615; *Street v. New York*, 394 U.S. 576, 592; cf. *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534.
>
> In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. Since the jury found, upon ample evidence, that O'Connor, as an agent of the State, knowingly did so confine Donaldson, it properly concluded that O'Connor violated Donaldson's constitutional right to freedom."

CONCLUSION

The consequences of this decision will be widespread if followed in New York and other jurisdiction and will make the principle of the case of *O'Connor v. Donaldson* sterile and deprives persons of their constitutional right of freedom when such persons are classed as harmless mentally ill because they have been denied the presumption of sanity and in addition to loss of freedom suffer "degradation, indignities, humiliation, frustration and deprivation" without hope or cure because of their outright *illegal* confinement in an institution which gives "custodial, not medical, not psychiatric" care (see page 638 of record).

The appellant respectfully requests that probable jurisdiction be noted.

Respectfully submitted,

GEORGE V. O'HAIRE
Attorney for Claimant-appellant
Office and P.O. Address
350 Fifth Avenue
New York, N.Y. 10001
(212) 244-2000

AARON J. BRODER
Of Counsel

Appendix

APPENDIX A

MEMORANDUM

STATE OF NEW YORK
COURT OF APPEALS

ALPHONSE VITELLO,

Appellant,

vs.

STATE OF NEW YORK,

Respondent.

---

(251)

Bernard Meyerson, George V. O'Haire & Aaron J. Broder for appellant.

Louis J. Lefkowitz, Attorney-General (Jeremiah Jochnowitz and Ruth Kessler Toch of counsel) for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed. Appellant failed to establish, as is necessary for a recovery, that he was sane at the time of his original commitment to Dannemora State Hospital or that he recovered his sanity at any time during his subsequent 29-year stay. (*Dennison v. State of New York*, 28 AD2d 608, affd 23 NY2d 996, cert den 397 US 923.) While not dispositive, it is significant to note that during the period in question appellant's sanity was subject to judicial review on at least eight separate

occasions. Each time his commitment to Dannemora State Hospital was sustained.

* * *

Order affirmed, without costs, in a memorandum. All concur.

Decided June 2, 1976

APPENDIX B

REMITTITUR

STATE OF NEW YORK
COURT OF APPEALS

ALPHONSE VITELLO,

Appellant,

vs.

STATE OF NEW YORK,

Respondent.

The appellant(s) in the above entitled appeal appeared by George V. O'Haire; the respondent(s) appeared by Louis J. Lefkowitz, Attorney General.

The Court, after due deliberation, orders and adjudges that the order of the Appellate Division is affirmed, without costs, in a memorandum. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Court of Claims, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/Joseph W. Bellacosa
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 2, 1976

APPENDIX C

JUDGMENT

COURT OF CLAIMS: STATE OF NEW YORK

ALPHONSE VITELLO,

Claimant,

-against-

STATE OF NEW YORK,

Respondent.

The above-named Claimant-Appellant having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office of the Court of Claims on June 18, 1975, reversing the judgment appealed from, on the law and the facts, and dismissing the claim, without costs, and judgment in accordance with the said Order of the Appellate Division having been entered in the Clerk's Office of the Court of Claims on July 15, 1975, and the said appeal having come on before a term of the Court of Appeals, by George V. O'Haire, attorney for the claimant-appellant, and by the Honorable Louis J. Lefkowitz, Attorney General for the respondent, and after due deliberation the Court of Appeals having handed down its decision on June 2, 1976, affirming the Order appealed from, without costs, in a memorandum, all concurring; and an Order having been entered in Court of Appeals on June 2, 1976, in accordance with said decision, further ordering that the record aforesaid and the proceedings in

this Court be remitted to the New York State Court of Claims, there to be proceeded upon according to law;

AND the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on June 2, 1976, having been filed in the Clerk's Office of the Court of Claims on June 9, 1976, it is

ORDERED AND ADJUDGED that the Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office of the Court of Claims on June 18, 1975, reversing the judgment appealed from, on the law and the facts, and dismissing the claim, without costs, be and the same is hereby affirmed.

Dated: Albany, New York
September 10, 1976

s/ David B. Klingaman
Deputy Chief Clerk of the Court of Claims

APPENDIX D

DECISION OF THE APPELLATE DIVISION

SUPREME COURT APPELLATE DIVISION
THIRD DEPARTMENT

ALPHONSE VITELLO,

Respondent-Appellant,

-against-

STATE OF NEW YORK,

Appellant-Respondent.

Dated June 12, 1975

Cross appeals from a judgment in favor of claimant, entered March 12, 1974, upon a decision of the Court of Claims.

On June 12, 1935, claimant pled guilty to attempted robbery and received a five-year sentence to Sing Sing Prison. After a transfer to the Great Meadow Prison, he exhibited violent and allegedly psychotic behavior, as a result of which he was transferred to the Dannemora State Hospital. In December of 1938, before the expiration of his maximum sentence, the hospital superintendent petitioned the Clinton County Court for an order dispensing with personal service and adjudging the claimant insane. Upon the certification of two qualified psychiatric examiners, the order was granted and, upon the authority of this order, the claimant was held beyond the expiration of his

maximum sentence. Though he challenged the legality of his incarceration on several occasions through habeas corpus proceedings, he was unsuccessful. In April of 1966, after his condition had improved, he was transferred to the Central Islip State Hospital where he voluntarily remained for continuing treatment.

Claimant alleges three causes of action in his claim against the State, asserting lack of proper medical and physical care, false imprisonment, and a violation of his constitutional and civil rights as a result of his unlawful detention. The trial court dismissed the first and third causes of action, but found that the 1938 proceeding was illegal and awarded claimant $100,000 damages for false imprisonment. Since claimant here only contests the adequacy of the award, we need not concern ourselves with the first and third causes of action. The State appeals from the judgment, contending that the claimant is not entitled to damages for the reason that he failed to demonstrate that he was sane for any period during his confinement. We agree.

Even if we assume that the 1938 proceeding was, in fact, illegal, claimant must sustain the burden of demonstrating that he was damaged by the illegal detention if he is to recover on that theory. He must prove "whether he was sane during any of the period between the date of his original commitment and the date of his release" (*Troutman v. State of New York*, 273 App. Div. 619, 622). More recently in *Dennison v. State of New York* (28 A.D. 2d 608, affd. 23 N.Y. 2d 996, cert. den. 397 U.S. 923) and *Scott v. State of New York* (34 A.D. 2d 1041, affd. 28 N.Y. 2d 847) this court reaffirmed that principle. Claimant's counsel argues that *Scott* (*supra*) and *Dennison* (*supra*) are distinguishable from the case at hand, in that there was no claim in either of those cases that the claimants were sane at any time during confinement. That is, of course, true, but, while claimant here asserts he was sane, the court, after considering the conflicting testimony of the respective

experts and after reviewing the hospital records, concluded that "claimant has not established that he was sane during that period. Claimant in this regard has failed to sustain the burden of proof." An analysis of the medical proof and the testimony in its totality provides an abundance of credible evidence to support the court's determination. So, while claimant here alleges that he was sane, the trial court found otherwise, and, since he has failed to sustain that burden, his claim must be dismissed. In view of this holding, we need not decide any other issue.

Judgment reversed, on the law and the facts, and claim dismissed, without costs.

HERLIHY, P.J., GREENBLOTT, MAIN, LARKIN and REYNOLDS, JJ., concur.

APPENDIX E

ORDER OF THE APPELLATE DIVISION APPEALED FROM

Supreme Court
Appellate Division
Third Department

Alphonse Vitello
Respondent-Appellant,

against

State of New York
Appellant-Respondent.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building, in the City of Albany, New York, commencing on the 14th day of April, 1975.

PRESENT:
HON. J. CLARENCE HERLIHY, Presiding Justice
HON. LOUIS M. GREENBLOTT
HON. ROBERT G. MAIN
HON. JOHN L. LARKIN
HON. WALTER B. REYNOLDS, Associate Justices

(SAME TITLE)

The State of New York having appealed from a judgment of the Court of Claims entered on March 12, 1974, and said appeal having been presented during the above-stated Term of this Court, and having been argued by Jeremiah Jochnowitz, Esq., of counsel for appellant-respondent, and

Bernard Meyerson, Esq., of counsel for the respondent-appellant, and, after due deliberation, the Court having rendered a decision on June 12, 1975, it is hereby

Ordered, that the judgment be reversed, on the law and the facts, and the claim dismissed, without costs.

ENTER:

s/John J. O'Brien
Clerk

Dated and Entered: June 17, 1975

A TRUE COPY
s/John J. O'Brien, Clerk

APPENDIX F

JUDGMENT

COURT OF CLAIMS—STATE OF NEW YORK

ALPHONSE VITELLO,

Claimant-respondent-appellant,

-against-

STATE OF NEW YORK,

Appellant-Respondent.

The above-named appellant-respondent, THE STATE OF NEW YORK, having appealed to the Appellate Division of the Supreme Court, Third Judicial Department, and the claimant having cross-appealed from a judgment of the Court of Claims entered in the Clerk's Office thereof on March 12, 1974, in favor of the claimant and against the State of New York, being an award of $100,000.00, with interest in the sum of $333.33, for a total sum of $100,333.33 (Becker, J.); and the said appeals having been argued at a term of the Appellate Division of the Supreme Court, Third Judicial Department, held in the City of Albany, New York, by the Honorable Louis J. Lefkowitz, Attorney General, by Jeremiah Jochnowitz, Esq., of counsel for the appellant-respondent, and by Bernard Meyerson, Esq., of counsel for the claimant-respondent-appellant, and after due deliberation, the said Appellate Division of the Supreme Court having handed down its decision on June 12, 1975, reversing the judgment appealed from, on the law and the facts, and dismissing the

claim, without costs, Herlihy, P.J., Greenblatt, Main, Larkin and Reynolds, JJ., being present; and an Order having been entered in the Clerk's Office of the Appellate Division of the Supreme Court, Third Judicial Department, on the 17th day of June 1975 in accordance with said decision,

AND the original record on appeal together with a certified copy of the Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office thereof on June 17, 1975, having been filed in the Clerk's Office of the Court of Claims on June 18, 1975, it is

ORDERED AND ADJUDGED that the judgment of the Court of Claims, entered in the Clerk's Office thereof on March 12, 1974, be and the same is hereby reversed, on the law and the facts, and the claim is hereby dismissed, without costs.

DATED: Albany, New York
July 15, 1975

s/Lawrence Wayne
Chief Clerk of the Court of Claims

APPENDIX G

DECISION

STATE OF NEW YORK
COURT OF CLAIMS

ALPHONSE VITELLO,

-against-

THE STATE OF NEW YORK,

Defendant.

BEFORE: Honorable Daniel Becker, Judge of the Court of Claims

APPEARANCES:
For the Claimant:
George V. O'Haire, Esq.,
by Aaron J. Broder, Esq.
by Ralph A. Matalon, Esq.,
of Counsel

For the State:
Honorable Louis J. Lefkowitz,
Attorney General, by
Mordecai Bressler
Assistant Attorney General

The claimant brings this claim for $5,000,000.00, filed April 26, 1969 against the State of New York by his claim dated April 23, 1969. The claim has not been assigned or submitted to any other Court or tribunal for audit or determination.

The claim sets forth 3 causes of action. The first cause of action is grounded in negligence and alleges in substance a failure by the State to properly treat claimant during the periods of his incarceration or hospitalization in various State institutions. The second cause alleges false imprisonment for a period beyond the expiration of a criminal sentence of five years imposed on or about June 12, 1935 for the crime of Attempted Robbery, Third Degree (Second Offense). The third cause asserts that the State violated the civil and constitutional rights of the claimant over the period of time that he was hospitalized and incarcerated in the various State institutions.

A pre-trial motion was made by the State to dismiss the claim for untimely filing. The motion was denied by Judge Henry Lengyel (Motion No. M-13654, Decision dated May 28, 1971). The State appealed from said decision and the Appellate Division, Third Department affirmed the order. (*Vitello v. State of New York*, 39 A D 2d 792).

Judge Lengyel in his decision wrote:

> "We think we should point out, however, that the scattergun approach, of this inartistically drawn pleading, makes it difficult to discern and evaluate the separate causes of action. It is unfortunate that the State did not, a reasonable time after the claim was served, move for an order requiring the claimant to separately state and number his various causes of action. See, CPLR 3014 and 3024."

This Court agrees with the above observation of Juege Lengyel and hastens to point out that the state of the pleadings was still the same at the time of trial. In addition, no Bill of Particulars was ever demanded or served.

There are some facts which are conceded or clearly established:

Claimant Alphonse Vitello pleaded guilty in the County Court of Bronx County to the crime of Attempted Robbery,

Third Degree and on June 12, 1935 he was sentenced to five years at hard labor. He had earned credit for presentence time in jail from the date of his arrest on February 21, 1935 to the date of sentence. After sentence he was transferred to Sing Sing Prison. On October 4, 1935 he was transferred to Great Meadows Prison. On April 17, 1937, as the result of a Certificate of Lunacy which declared him to be insane, he was transferred to Dannemora State Hospital.

On December 19, 1938 while claimant was a patient at Dannemora State Hospital, a proceeding was commenced to have claimant certified as insane and to commit him to an institution for care and treatment. County Judge Cummins of Clinton County who issued the Order dispensed with service of notice of said proceeding because of claimant's condition. Judge Cummins' order was dated December 27, 1938.

Claimant continued as a patient at Dannemora State Hospital. In February 1959 claimant in his own handwriting made an application for a Writ of Habeas Corpus which was referred to Supreme Court Justice Felix J. Aulisi of Clinton County. After a hearing, Justice Aulisi made an order dated June 29, 1959 dismissing said Writ.

Thereafter claimant made application for a Writ of Habeas Corpus which was dismissed on June 13, 1959 by Supreme Court Justice Andrew W. Ryan in Clinton County. (Claimant's Exhibit 9).

Thereafter another Writ of Habeas Corpus was dismissed by Supreme Court Justice Ryan by order dated June 16, 1959. (Claimant's exhibit 8).

On February 24, 1961 claimant moved for a Writ of Habeas Corpus. The petition was denied by the Supreme Court, Clinton County on March 15, 1961. (Claimant's exhibit 10).

On August 12, 1964 Supreme Court Justice Harold R. Soden denied claimant's Writ of Error Coram Nobis and in a written opinion held that the transfer of mentally ill

prisoners to Dannemora State Hospital to be held after the expiration of their terms is authorized by §384 of the Correction Law. (State's exhibit A).

On July 30, 1965 claimant applied to County Judge Sherlock E. Haby of Clinton County for a Writ of Habeas Corpus who denied the application and refused to issue the Writ.

On April 13, 1966 claimant was transferred under commitment to Central Islip Hospital. On May 20, 1966 claimant signed an application for voluntary hospitalization. On December 1, 1966 an honor card was issued to claimant and overnight visits with his family were approved. He visited his home on several occasions between December 1, 1966 and May 11, 1967 when he was discharged.

The claimant testified in his own behalf. Dr. George S. Cattanach, a psychiatrist testified on behalf of claimant as did Francis Ryan and Audrey M. Bowman. Claimant then read as part of claimant's case portions of examinations before trial of Dr. Izaak Gorlicki, a psychiatrist employed by the State of New York.

The claimant then rested.

After making motions to dismiss on which decision was reserved, the State called Irene F. Dougherty, an employee of New York State Department of Correctional services. Dr. John Lanzkron, a psychiatrist then testified for the State. The State read portions of the examinations before trial of Dr. Gorlicki and of the claimant.

Both sides then rested.

Appropriate motions to dismiss the claim and to strike testimony were made and decisiony was reserved.

An examination of the records and the exhibits leads to the sorry conclusion that the record keeping and procedural approaches in Dannemora State Hospital was to say the least slipshod as shall hereafter be pointed out.

The proof establishes the fact that the claimant was indicted for Robbery First Degree and on June 12, 1935 was sentenced on his plea of guilty in the County Court of Bronx County for the felony crime of Attempted Robbery, Third Degree and was sentenced to imprisonment in the State Prison at Sing Sing at hard labor for a term of five years. (Claimant's exhibit 1).

On October 4, 1935 claimant was transferred from Sing Sing Prison to Great Meadows Prison.

On April 15, 1937, Dr. Arthur N. Foxe, a psychiatrist at Great Meadows Prison, signed a Certificate of Lunacy certifying that in his opinion Alphonse Vitello, a convict confined at Great Meadows Prison, was insane. Based on that certificate, Honorable Joseph H. Wilson, Warden of Great Meadows Prison, transferred the claimant to Dannemora State Hospital. (Claimant's exhibit 2).

While the papers in this proceeding were on forms issued pursuant to the Insanity Law (L. 1912 ch. 121), it should be pointed out that the Insanity Law had already been repealed by Chapter 426 of the Laws of 1927. Actually, this provision of the law was replaced by Section 383 of the Correction Law effective April 2, 1929. (L. 1929 ch. 243).

Pursuant to said order of transfer dated April 15, 1937, claimant was transferred to Dannemora State Hospital.

The record indicates that thereafter and on December 19, 1938 Dr. Blakely R. Webster, the Superintendent of Dannemora State Hospital, pursuant to the Mental Hygiene Law, signed a petition based on a certificate made by two qualified examiners certified by the Department of Mental Hygiene and applied for an order adjudging claimant to be mentally sick and for his commitment to an institution for the care and treatment of the mentally sick. The certificate of the examiners Dr. MacDonald and Dr. Rowlson certified that personal service of notice of the proceeding upon the patient would be detrimental to him. Thereafter, Honorable John Cummins, County Judge of

Clinton County, on December 27, 1938 signed an order dispensing with personal service. Judge Cummins by order dated December 27, 1938, based upon the petition of Dr. Webster and the certificate of the examiners, adjudged claimant insane and a proper subject for custody and treatment and ordered him to be committed to Dannemora State Hospital. (Claimant's Exhibit 3).

The lack of care in preparing the petition and the papers in connection therewith is apparent. For example, the forms used for this proceeding complied with the provisions of Sections 70 and 74 of the Mental Hygiene Law. It is evident that they did not apply to a person alleged to be mentally ill and who was a prisoner. This is borne out by an examination of Dr. Webster's petition which contains the printed statement that Vitello "is not under a criminal charge or indictment". However, just above this statement typed into a space provided on the form is the statement that "Alphonse Vitello was admitted to Dannemora State Hospital from Great Meadows Prison on April 17, 1937". It is evident that the petition was prepared and reviewed in a cursory manner with apparently little attention to the true facts. An examination of claimant's records with even the slightest degree of diligence would have established that the claimant was in fact a prisoner and confined under a criminal charge.

To compound the error, Judge Cummons' order contains the printed form statement "that he (claimant) is not in confinement under a criminal charge".

Claimant attacks the legality of the 1938 proceeding on several grounds:

(a) That claimant's term did not expire until February 21, 1940.

It is clear from the record that the claimant's term did not expire until February 21, 1940. The question we are first confronted with is whether this 1938 proceeding, if considered to be brought pursuant to the Correction Law,

was void because it was brought *before* the expiration of the claimant's criminal sentence.

The claimant would seem to contend that the Superintendent's application was prematurely made because the term of the prisoner had not yet expired. There is a sparsity of authority on this point. The closest case appears to be *The People of the State of New York ex rel. Joseph P.J. Winter v. W. Cecil Johnston, as Director of Dannemora Hospital,* 10 A D 2d 656. The *Winter* case dealt with a criminal who was sentenced on August 20, 1955 to an indeterminate term of 1 year, 6 months to 3 years. He was transferred to Dannemora State Hospital in November 1957. Section 384 of the Correction Law as amended in 1948 provided that application for a retention order be made "Within thirty days prior to the expiration of the term of a prisoner". The maximum term in the *Winter* case would have expired August 20, 1958 and in December 1957 an order of retention was issued by the Clinton County Court. The Appellate Division, Third Department in *Winter* held that the procedure was consistent with the Statute even though it had been taken some seven months before the expiration of Winter's term.

Assuming for the moment, but not finding as a fact, that the 1938 proceeding was a retention proceeding, the Court would overrule claimant's objection relying upon the above decision.

(b) That the examiner Dr. MacDonald was connected with Dannemora State Hospital and had no authority to act. It is contended that Dr. R.S. MacDonald was not a qualified examiner because he was in some way connected with Dannemora State Hospital. Although the brief only makes mention of Dr. MacDonald in this regard, the same objection was raised during the trial to Dr. Rawlson.

The claimant has failed to establish that either Dr. MacDonald or Dr. Rawlson were disqualified from acting as examiners.

(c) It is the claimant's contention that Vitello was not served with notice of the 1938 proceeding. The record indicates that Judge Cummins by his order of December 27, 1938 dispensed with the necessity of service as he was authorized to do by the then existing law. This objection is overruled.

(d), (e) and (f). Claimant contends that the 1938 proceeding was illegal since it was brought pursuant to the Mental Hygiene Law which deals only with persons not held on criminal charges.

In 1938 the Mental Hygiene Law, Sections 70 and 74, provided the procedure relating to the commitment of a mentally ill person who warrants institutional care in a civil institution and "who is not in confinement on a criminal charge". Claimant in 1938 was a convict in confinement on a criminal charge whose term had not yet expired and would not expire until February 21, 1940.

Since claimant was in fact a prisoner confined to Dannemora State Hospital on a Certificate of Lunacy, he could only be retained there pursuant to Section 384 of the Correction Law, at the expiration of his term. There was no provision in the Mental Hygiene Law which set forth the procedure regarding the retention of a convict. Moreover, it is clear that the claimant could have been confined to Dannemora for the duration of his sentence solely upon the Certificate of Lunacy and there was no need for any proceeding to judicially declare claimant insane.

Obviously there was a total lack of attention to the facts and details regarding claimant which resulted in a recitation of facts which were erroneous. The end result is that we have a Court Order which states that the claimant be committed to Dannemora pursuant to the Mental Hygiene Law, which had no application to a prisoner or convict still under sentence.

In sum, the 1938 proceeding before Judge Cummins only had the effect of establishing judicially the mental condition of the claimant. The end result is that we are confronted with an order directing claimant's commitment pursuant to the Mental Hygiene Law, which was not applicable to him.

If that presented the only difficulty, it might be overcome by the fact that there are holdings to the effect that the most essential part of an order is the directionary part requiring a certain thing to be done. (1 Leichter on Motion Practice, §30.05).

It has been held that it is improper to include in an order the factual finding or opinion upon which the Court bases its order. (*White v. White.* 175 Misc. 66, 22 NYS 2d 776).

However, the petition and the order in the 1938 proceeding do not in any manner or form describe or denote this proceeding as a retention proceeding. To argue that this proceeding was, or should be treated as a retention proceeding is a mere gesture and wholly without basis in fact and law. There is absolutely nothing in this record which establishes the reason why the printed forms applicable to the Mental Hygiene Law were used. These forms might have been proper had the erroneous references to the fact claimant was not under or being confined under a criminal charge been stricken from the petition and order and they had indicated the purpose of the proceeding was to retain claimant at the hospital. Modern practice dictates that the substance rather than the form of the proceeding should prevail. (CPLR, §§104, 2001, 2002).

This was not done however and upon the facts before it, the Court finds that the 1938 proceeding was not a retention proceeding and cannot be construed to be such a proceeding.

The fact is that this proceeding has no greater effect than the Certificate of Lunacy with regard to the confinement of claimant. Pursuant to the law as it existed in 1938, the claimant could have been hospitalized for treatment for mental illness for the duration of his sentence. The 1938

proceeding was merely an excess, a superfluous and unnecessary proceeding since the authorities already had the apparent right to hold claimant until the expiration of his sentence. Moreover, it could not serve to retain or hold claimant after February 21, 1940. Clearly, the only manner by which Vitello could have been held beyond that date was pursuant to the mandates of Section 384 of the Correction Law. Consequently it was incumbent upon the State to have commenced a proceeding for a proper and legal retention order or released claimant as provided under the law. (Correction Law, §§ 384, 385).

However, the State did absolutely nothing in this matter after the 1938 proceeding until January 4, 1961 when a petition, pursuant to Section 384 of the Correction Law, was presented to Surrogate's Court Clinton County by Dr. W.C. Johnston, Superintendent at Dannemora, requesting an examination of claimant. In his petition he states that claimant's "term of imprisonment is about to expire". That statement cannot be supported by the facts. Had any diligence been exercised by this individual he would have discovered that claimant's term had expired 21 years prior to his application.

The 1961 retention proceeding could not in any way legalize the confinement of the claimant in Dannemora State Hospital from February 21, 1940. (*Warner v. State*, 297 N.Y. 395).

In fact, the 1961 proceeding was not even taken in accordance with Section 384 of the Correction Law. Both the petition and the Court's order of February 8, 1961 erroneously treated claimant as one whose term of imprisonment was *about* to expire. Furthermore, the proceeding was not brought within 30 days prior to the expiration of his term on February 21, 1940 as provided for by Section 384 of the Correction Law, as amended.

As Judge Fuld observed at page 404 in *Warner v. State*, supra:

> "Agents of the State, as well as private citizens, are bound to observe the requirements of the law before an individual may justifiably be held in a mental institution and subjected to its impact and stigma; failure to do so renders the State liable for the wrong (Court of Claims Act, §8)."

Even a cursory examination of the records would have revealed to the agents of the State that neither the 1938 nor the 1961 proceeding was the retention proceeding provided for by the law. I must conclude therefore that the claimant was illegally detained at Dannemora State Hospital from February 21, 1940 until May 20, 1966. Clearly this constituted a false imprisonment. (On May 20, 1966 claimant went on voluntary status.)

The first part of the claim is based upon the assertion that the State failed to properly treat claimant while he was incarcerated or hospitalized.

During the trial the contentions were repeatedly made that the determinations made by the State's doctors were in error, and that claimant did not receive proper care and treatment. Although this has not been established, it should be pointed out that there can be no liability in this respect without a showing that such determinations and actions by the doctors constituted negligence rather than an error of professional judgment. (*St. George v. State*, 283 App. Div. 245, affd. 308 N.Y. 681; *Dennison v. State*, 28 A D 2d 608, affd. 23 N Y 2d 996; *Higgins v. State*, 24 A D 2d 147; *Taig v. State*, 19 A D 2d 182).

The operation of a State institution is governmental and subject to governmental and administrative decisions and the State has not waived its immunity from liability resulting from such decisions. (*Young v. State*, 40 A D 2d 730, lv. to app. den. 31 N Y 2d 646; *Ferrucci v. State*, 42 A D 2d 359).

The claimant has failed to establish this cause of action by the greater weight of the credible evidence and that part of the claim is dismissed.

I have already dealt with the second part of the claim which deals with false imprisonment.

The third facet of the claim charges a violation of claimant's civil and constitutional rights and in my opinion is contained within the second cause of action which has already been dealt with by me.

The contention was raised on the trial by the claimant that he was sane during all the periods of time that he was confined up to his discharge. Testimony was submitted on behalf of the claimant by a psychiatrist who saw claimant for the first time in the summer of 1969. He also examined the hospital records and the prison records and he testified that the claimant demonstrated no abnormality of personality, thinking, emotion or behavior prior to 1935. He testified that on April 15, 1937 the claimant was suffering from "an emotional storm, or transient temporary emotional storm" and that he had no psychiatric abnormality; that he found nothing in the records which was any diagnostic example of psychotic behavior and that in his opinion claimant was normal and not psychotic at any time up to the time he was discharged on May 10, 1967. (S.M. Vol. III, p. 442).

The psychiatrist disagreed with the diagnosis of dementia praecox which was contained in the hospital records and he concluded that the claimant from his examination of him and from his examination of the record from the period April 17, 1937 to May 10, 1967 was "sane the entire time". (S.M. Vol. IV, p. 610).

On this same subject the State called a psychiatrist. This witness never examined the claimant but based his testimony on the examination of the claimant's records at Dannemora State Hospital, Central Islip Hospital, Sing Sing Prison and Great Meadows Prison. Based on those records he testified that claimant on April 15, 1937 was in a psychotic state (S.M., Vol. VII, p. 345) and that on April 13, 1966 on his discharge from Dannemora State Hospital

he was improved from his psychosis but still psychotic. (S.M., Vol. VII, pp. 345, 346).

The State also called a supervising psychiatrist employed by the State who testified that he became Assistant Director at Central Islip State Hospital on July 17, 1963; that the records indicate that the claimant was received at Central Islip State Hospital April 13, 1966 and that claimant signed an application on May 20, 1966 to change his status to that of a voluntary patient. He testified that from a reading of claimant's record at Central Islip he reached the opinion that he was psychotic when he entered but much improved when released in May 1967.

There was also read into the record parts of an examination before trial of Isaac Gorlicki, a State psychiatrist, which examination was held August 28, 1972. Dr. Gorlicki testified in part that the claimant's records indicated a finding that he suffered from the disease of schizophrenia hebephrenia, paranoia. (S.M., Vol. II, p. 216).

It continually astounds this Court in cases involving psychiatric testimony how two doctors, specialists in their fields and with eminent backgrounds, can take the same record of a patient and arrive at different conclusions regarding sanity. As Judge Richard S. Heller observed in *Dennison v. State*, 49 Misc. 2d 553, revd. on other grounds, 28 A D 2d 608:

> "What appear to be different diagnoses, turn out to be semantic disputes, the existence of which are the clearest indication that in the field of psychiatry there are many hypotheses but distressingly few answers."

The burden of proof remains on the claimant to establish every element of his claim, including the claim that he was sane during all the time he was confined.

It is sheer conjecture that the two examinations by Dr. Cattanach and his examination of the records in the

summer of 1969, some 32 years after claimant was confined in Dannemora State Hospital, is of any value in determining claimant's mental condition from the period 1937 through 1967. The same is true of the testimony of the State's psychiatrist, Dr. Lanzkron. I give little weight to their testimony in this respect.

The doctors who had claimant under their supervision found him to be psychotic.

On the proof before me, claimant has not established that he was sane during that period. Claimant, in this regard, has failed to sustain the burden of proof.

Claimant's status as of May 20, 1966 was that of a voluntary patient with a right to leave Central Islip Hospital on 10 days notice and the Court considers that date to be the date on which his wrongful detention ceased.

At the conclusion of the trial the Court afforded the parties an opportunity to file memoranda and proposed findings of fact pursuant to CPLR §4213. The State has not filed either a brief or proposed findings of fact although the Court has inquired repeatedly to ascertain if the State intended to file the same. The Court's inquiries have gone unanswered. The claimant did submit some 199 proposed findings of fact.

The Court has endeavored to set forth in its decision the basis for the conclusions it reached. In so doing it has set forth in detail all the facts it considered to be essential in this action. The Court considers that such a procedure fully complies with the requirements of CPLR §4213. When the Court renders a written decision, setting forth in detail the facts deemed essential, it constitutes the decision of this Court and it becomes unnecessary to make separate formal findings. (see: *Whitree v. State*, 56 Misc. 2d 693; *Harbor Associates, Inc. v. Asheroff*, 57 Misc. 2d 1016, affd. 35 A D 2d 667; 4 Weinstein-Korn-Miller, N.Y. Civ. Prac, par. 4213.04; 8 Carmody-Wait 2d, §60:21). For these reasons the Court has not marked the proposed findings of fact

submitted by claimant but they are being filed with the decision in the office of the Clerk of this Court.

On the question of damages the proof would indicate that claimant's employment both prior to his commitment and after his discharge was irregular and not steady. His earnings before and after his commitment were meager.

All motions not previously passed upon are now denied.

The Court awards the claimant the sum of $100,000.00 for all damages as herein incurred and sustained during the period February 21, 1940 to May 20, 1966. The Court in arriving at this sum has also given consideration to the degradation, indignities, humiliation, frustration and deprivation claimant suffered by reason of this false imprisonment.

This memorandum constitutes the written and signed decision of the Court in conformity with CPLR, §4213(b).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 22, 1974
Newburgh, New York

s/ DAVID BECKER
Judge of the Court of Claims

APPENDIX H

JUDGMENT

State of New York
Court of Claims

Alphonse Vitello,

against

The State of New York,

Defendant.

GEORGE V. O'HAIRE, ESQ., Attorney for Claimant, by AARON J. BRODER, ESQ., by RALPH A. MATALON, ESQ., of Counsel.

HONORABLE LOUIS J. LEFKOWITZ, Attorney General, by JOSEPH T. HOPKINS, ESQ., and MORDECAI BRESSLER, ESQ., Assistant Attorneys General, of Counsel, for The State of New York.

This claim for the sum of Five Million ($5,000,000.00) Dollars for false imprisonment, improper treatment during the periods of his incarceration or hospitalization, and violation of his civil and constitutional rights over the period of time he was hospitalized and incarcerated in various State institutions, due to the alleged negligence of the State of New York, its officers, agents, servants and employees during the period February 21, 1940 to May 20, 1966; filed April 26, 1969 and numbered 50937, came on to be heard before this Court at a session thereof held at Watertown, New York, on May 14, 15, 16, 17, 18, 21, 22 and 23, 1973, before the Honorable Daniel Becker, a Judge of the Court of Claims.

The Court having heard the proofs and allegations of the

parties and having duly made and filed its Decision, as well as claimant's proposed findings of fact and conclusions of law, unmarked, it is

ORDERED AND ADJUDGED that ALPHONSE VITELLO, the above named claimant, recover herein against the State of New York the sum of One Hundred Thousand ($100,000.00) Dollars with interest thereon, at the rate of six percent per annum, from February 22, 1974, the date of decision, to March 12, 1974, the date of entry of judgment herein, to wit: the sum of Three Hundred Thirty-Three and 33/100 ($333,33) Dollars, amounting in all to the sum of One Hundred Thousand Three Hundred Thirty Three and 33/100 ($100,333.33) Dollars for all damages as herein incurred and sustained during the period February 21, 1940 to May 20, 1966, and in consideration to the degradation, indignities, humiliation, frustration and deprivation suffered by reason of the false imprisonment of claimant, and in full settlement of said claim.

DATED: Albany, New York
March 12, 1974

s/LAWRENCE WAYNE
Chief Clerk of the Court of Claims

FILED
NOV. 15, 1976

APPENDIX I

NOTICE OF APPEAL

STATE OF NEW YORK: COURT OF CLAIMS

ALPHONSE VITELLO,

Claimant-Appellant

-against-

THE STATE OF NEW YORK,

Respondent-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES:

Notice is hereby given that ALPHONSE VITELLO claimant-appellant, above named, hereby appeals to the Supreme Court of the United States from a final Judgment entered in the Office of the Clerk of the Court of Claims, State of New York, on the 10th day of September, 1976, upon an order of the Court of Appeals of the State of New York affirming an order of the Appellate Division Third Department, State of New York, dated June 17, 1975, and a Judgment of said Appellate Division, entered in the Office of the Clerk of the Court of Claims on the 15th day of July, 1975, which order and Judgment reversed the Judgment of the Court of Claims of the State of New York entered on the 12th day of March, 1974, and dismissed the Claim of Claimant.

This appeal is taken pursuant to 28 USCA, S. 1257 (2).

Dated: November 12, 1976

Yours, etc.,

GEORGE V. O'HAIRE
Attorney for Appellant
129 Newbridge Road
Hicksville, N.Y. 11801
(516) 933-7500

TO: HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
The Capitol
Albany, N.Y. 12204

CLERK, COURT OF CLAIMS

Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

(G-158)

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-721

ALPHONSE VITELLO,

Claimant-Appellant,

— against —

THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS APPEAL AND BRIEF

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee
The Capitol
Albany, New York 12224
Telephone: (518) 474-7173

RUTH KESSLER TOCH
Solicitor General

JEREMIAH JOCHNOWITZ
Assistant Attorney General

Of Counsel

TABLE OF CONTENTS

	Page
Motion to Dismiss Appeal and Brief	1
The Nature of the Case	1
United States Statutes Involved	4
Rules of the United States Supreme Court Involved	5
New York State Statutes Involved	6
Decision of the New York Court of Appeals	8
ARGUMENT:	
POINT I — The appeal should be dismissed because the notice of appeal and the jurisdictional statement were not timely filed	9
POINT II — The appeal should be dismissed on the further ground that there was no Federal question considered or decided by the Court of Appeals	11
Conclusion	13

Case Cited:

Department of Banking of Nebraska v. *Pink*, 317 U.S. 264 (1942), rehearing denied 318 U.S. 802 (1942)	9

Laws Cited:

New York State Correction Law Sec. 383	6
New York State Correction Law Sec. 384	2, 6, 12
New York State Mental Hygiene Law Sec. 70	2, 12
New York State Mental Hygiene Law Sec. 74	2, 7, 12
28 U.S.C. 2101	4, 9
28 U.S.C. 1257	4, 9
United States Supreme Court Rule 14(2)	4, 5

In The

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-721

ALPHONSE VITELLO,

Claimant-Appellant,

— against —

THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS APPEAL AND BRIEF

The appellee moves the Court to dismiss the appeal herein on the ground that the notice of appeal was not timely filed and on the further ground that it is manifest that no substantial Federal question was raised in the court below.

The Nature of the Case

The appeal raises the question of the alleged violation of constitutional and civil rights of appellant Alphonse Vitello. Alphonse Vitello filed a claim on April 26, 1969 for false imprisonment by reason of his confinement to Dannemora State Hospital in the New York State Court of Claims*. The Court

---

* The New York State Court of Claims will hereafter be referred to as Court of Claims.

of Claims rendered a judgment in favor of claimant for $100, 333.33 (29a)*. The Court of Claims found that claimant was retained in New York State institutions after the determination of a prison sentence and that his retention was not secured under the proper New York State law** and therefore the institution lacked the authority to retain him. The Court of Claims dismissed all other causes of action by claimant including that of alleged improper treatment and medication during his stay in the New York State institution and found that he had not proven that he was improperly treated during the period that he was in the State institutions (13a-27a).

An appeal was taken by the appellee to the New York State Supreme Court, Appellate Division, Third Department***, which by order dated June 17, 1975 reversed the judgment of the Court of Claims on the law and the facts and dismissed the claim (9a-10a). The Appellate Division noted that there were three causes of action against the State, to wit (7a):

> "asserting lack of proper medical and physical care, false imprisonment, and a violation of his constitutional and civil rights as a result of his unlawful detention."

and further that claimant in the Appellate Division only contested the adequacy of the award and not the other findings made by the Court of Claims.

The Appellate Division reversed the judgment of the Court of Claims and dismissed the claim by order dated June 17,

---

* Numbers in parenthesis refer to pages in Appellant's Jurisdictional Statement.

** The Court of Claims stated that the application should have been made under the then provisions of the New York State Correction Law, Sec. 384 but was in fact made under New York State Mental Hygiene Law, Sections 70 and 74.

*** The New York State Supreme Court, Appellate Division, Third Department will hereinafter be referred to as the Appellate Division.

1975. In its memorandum decision dated June 12, 1975, it held that it was incumbent on claimant to demonstrate that he had been damaged by his alleged illegal detention and that he failed to sustain proof of the same (7a-8a).

Claimant appealed to the New York State Court of Appeals* from the order of the Appellate Division reversing the judgment of the Court of Claims. The Court of Appeals rendered its decision on June 2, 1976, affirming the dismissal of the claim and issued a remittitur to the Court of Claims to proceed in accordance with its decision (1a-2a). The remittitur was also dated June 2, 1976. Pursuant to and as directed by the remittitur of the Court of Appeals the Court of Claims entered a further judgment dismissing the claim on September 10, 1976 (3a). No mention of a constitutional question was made either in the decision or remittitur of the New York State Court of Appeals.

On November 16, 1976, this office received from George V. O'Haire, appellant's attorney, a notice of appeal to the Supreme Court of the United States on behalf of the appellant. This notice of appeal stated that it was from (30a):

> "a final Judgment entered in the Office of the Clerk of the Court of Claims, State of New York, on the 10th day of September, 1976, upon an order of the Court of Appeals of the State of New York."

The appeal to the Supreme Court of the United States would not be from this judgment of the Court of Claims but from the order and remittitur of the Court of Appeals dated June 2, 1976.

Thereafter, appellee by notice of motion to the Court of Claims and upon affidavit of Jeremiah Jochnowitz dated November 19, 1976, made a motion to the Court of Claims returnable on December 7, 1976 to dismiss the appeal.* This

---

* The New York State Court of Appeals will hereinafter be referred to as Court of Appeals.

* This motion was adjourned pending the decision by this Court on the instant motion.

motion was made pursuant to Rule 14(2) of the Rules of the Supreme Court of the United States to the Court of Claims, the Court which had possession of the records in the case.

On November 26, 1976 the jurisdictional statement in this matter was received by this office and on November 29, 1976 we were advised by Wallace and O'Haire that the jurisdictional statement was docketed on November 23, 1976 with docket number 76-721.

United States Statutes Involved

28 United States Code (Judiciary and Judicial Procedure), Sec. 1257.

"Sec. 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 United States Code (Judiciary and Judicial Procedure), Sec. 2101(a)(b)(c).

"Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title,

holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rules of the United States Supreme Court Involved

Rules Supreme Court United States (14)

"14.

DISMISSING APPEALS FOR NON-PROSECUTION

1. After a notice of appeal has been filed, but before the case has been docketed in this court, the parties may at any time dismiss the appeal by stipulation filed in the court possessed of the record, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 60.

2. If an appeal which has been noted is not docketed in this court within the time for docketing, plus any enlargement thereof duly granted, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such orders thereon with respect to costs as may be just.

3. If an appeal which has been noted is not docketed in this court within the time for docketing, plus any enlargement thereof duly granted, and the court possessed of the record has for any reason denied an appellee's

motion, made as provided in the foregoing paragraph, to dismiss the appeal, the appellee may have the cause docketed and the appeal dismissed in this court, by producing a certificate, whether in term or vacation, from the clerk of the court possessed of the record, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 35 and be accompanied by proof of service as prescribed by Rule 33. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the court will give judgment against the appellant and in favor of appellee for costs. In no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this paragraph, unless by special leave of court."

New York State Statutes Involved

New York Correction Law, Sections 383, 384, as they existed in 1938:

"Sec. 383. Transfer of prisoners in state prisons, reformatories and penitentiaries and in the institution for male defective delinquents to Dannemora state hospital. Whenever the physician or the psychiatrist of any one of the state prisons, reformatories or penitentiaries or of the institution for male defective delinquents shall certify to the warden or superintendent thereof, that a male prisoner confined therein and sentenced or committed thereto for a felony, is, in his opinion insane, such warden or superintendent shall cause such prisoner to be transferred to the Dannemora state hospital and delivered to the medical superintendent thereof. Such superintendent shall receive the prisoner into such hospital, and retain him there until legally discharged. The warden or superintendent, before transferring such insane prisoner, shall see that he is in a state of bodily cleanliness, and is provided with a new suit of clothing similar to that furnished to prisoners on their discharge from prison. At the time of such transfer, there shall be transmitted to the superintendent of such hospital the original certificate of conviction and the certificate of insanity executed by the physician or psychiatrist, which shall be filed in the office of such superintendent, who shall file a notice of such transfer in the office of the department of correction."

"Sec. 384. Retention of insane prisoners after the expiration of their terms

When the term of a prisoner confined in Dannemora state hospital has expired, and, in the opinion of the superintendent, such prisoner continues insane, the superintendent shall aply to a judge of a court of record to cause an examination to be made of such person, by two legally qualified examiners, other than a physician connected with such hospital, qualified as provided in the mental hygiene law. Such examiners shall be designated by the judge to whom the application is made. Such examiners, if satisfied, after a personal examination, that such prisoner is insane, shall make a certificate to such effect in the form and manner prescribed by article five of the mental hygiene law, for the commitment of insane persons to state hospitals. Such superintendent shall apply to a judge of a court of record for an order authorizing him to retain such prisoner at the Dannemora state hospital accompanying such application with such certificate in lunacy. Such judge, if satisfied that such prisoner continues insane, shall issue such order of retention, and such superintendent shall thereupon retain the prisoner at Dannemora state hospital until discharged as provided by law. The certificate in lunacy and order of retention shall be kept by the superintendent in his office, and a copy thereof shall be filed in the office of the department of mental hygiene. The costs necessarily incurred in determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora state hospital, and be paid in the same manner as are other expenses of such hospital."

New York Mental Hygiene Law, Sec. 74, as it existed in 1938:

"Sec. 74. Admission on court commitment. 1. A person alleged to be insane, and who is not in confinement on a criminal charge, may be committed to and confined in an institution for the custody and treatment of the insane, upon an order made by a judge of a court of record of the city or county, or a justice of the supreme court of the judicial district in which the alleged insane person resides or may be, adjudging such person to be insane, upon a certificate made by two qualified examiners, accompanied by a verified petition therefor, or upon such certificate and petition, and after a hearing, as provided in this section.

* * *

3. Except as hereinafter provided, notice of such application shall be served personally, at least one day before making such application, upon the person alleged to be insane. Notwithstanding the foregoing provision, if the judge to whom application is made, be satisfied from any statement contained in the papers in the proceedings, or from inquiry, that personal service of the notice on the alleged insane person would be ineffective or detrimental to such person, he may, in his discretion, dispense therewith, and he shall dispense therewith, if the qualified examiners state in writing, under oath, that personal service upon the alleged insane person would in their opinion be detrimental to such person. However, whether such personal service on the alleged insane person be dispensed with or not, and the petition be made by a person other than the wife, husband, father, mother or other nearest relative, such notice shall be served upon such wife, husband, father, mother or other nearest relative of such alleged insane person, if there be any such person known to be within the county; if not, upon the person with whom such alleged insane person may reside, or at whose home he may be, or in their absence, upon a friend of such alleged insane person; and if there be no such person or persons, such service shall in writing be dispensed with."

Decision of the New York Court of Appeals
(1a-2a)

The Court of Appeals handed down its memorandum decision on June 2, 1976. In its decision, it said (1a):

> "The order of the Appellate Division should be affirmed. Appellant failed to establish, as is necessary for a recovery, that he was sane at the time of his original commitment to Dannemora State Hospital or that he recovered his sanity at any time during his subsequent 29-year stay. (*Dennison* v. *State of New York*, 28 AD2d 608, affd 23 NY2d 996, cert den 397 US 923.)"

It did not mention any other questions as being passed on.

ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED BECAUSE THE NOTICE OF APPEAL AND THE JURISDICTIONAL STATEMENT WERE NOT TIMELY FILED.

In his notice of appeal, appellant states that he is appealing from a final judgment entered in the Court of Claims on the 10th day of September, 1976 "upon an order of the Court of Appeals". 28 United States Code 1257 (Judiciary and Judicial Procedure) provides that appeals are to be taken from the State's highest Court from which the decision was rendered. The highest Court in this case was the New York Court of Appeals and its decision and remittitur both were dated June 2, 1976. It was necessary that appellant file both the notice of appeal and the jurisdictional statement within 90 days of that date (28 U.S.C. 2101). The notice of appeal is dated November 12, 1976, more than 90 days after the Court of Appeals decision and remittitur. The jurisdictional statement was filed on November 23, 1976, even later.

Appellant appears to take the position that the appeal is from the judgment of the Court of Claims which was entered on September 10, 1976. The appeal is not taken from the judgment of the Court of Claims but from the highest Court of the State which rendered its decision in the matter and in this case that was the New York Court of Appeals. This question was considered in *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264 (1942) rehearing denied 318 U.S. 802 (1942). In that case this Court considered the question of when the time to appeal to the Supreme Court of the United States starts running from an order of a State appellate court where it directs a lower State court to enter a judgment based on its decision. This Court said (pp. 267-268):

> "Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two

cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Alterton* v. *Fowler*, 91 U. S. 143, 146. In reliance upon the early decision in *Green* v. *Van Buskerk*, 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under Sec. 237 of the Judicial Code, 28 U.S.C. Sec. 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in *Mower* v. *Fletcher*, 114 U.S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts* v. *Hoagland*, 105 U.S. 701, 702, and *Clark* v. *Williard*, 292 U.S. 112, 117-118. This rule applies with equal force to cases from New York in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of Sec. 237 of the Judicial Code, a final judgment reviewable here.

* * *

"Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

Since the decision of the Court of Appeals in the instant case determined the matter and the Court of Claims entering a judgment on the remittitur was merely a ministerial act required by it under the mandate of the Court of Appeals, claimant's time to appeal ended ninety days after June 2, 1976, the date of the Court of Appeals judgment, and therefore the filing of the notice of appeal and the jurisdictional statement were not timely.

POINT II

THE APPEAL SHOULD BE DISMISSED ON THE FURTHER GROUND THAT THERE WAS NO FEDERAL QUESTION CONSIDERED OR DECIDED BY THE COURT OF APPEALS.

The Court of Appeals in its decision and in its remittitur in this case made no mention of a Federal question. The decision of the Court of Appeals shows that it was on the facts in that it held that claimant-appellant had not proved that he was damaged by the State's action.

The Appellate Division stated that although originally there were three causes of action, one of which included an alleged violation of appellant's constitutional and civil rights, this cause of action was dismissed by the Court of Claims and that before, the Appellate Division was the only ruling of the Court of Claims which claimant was contesting; viz: the adequacy of the damages awarded. The Appellate Division said in its opinion (7a):

> "Claimant alleges three causes of action in his claim against the State, asserting lack of proper medical and physical care, false imprisonment, and a violation of his constitutional and civil rights as a result of his unlawful detention. The trial court dismissed the first and third causes of action, but found that the 1938 proceeding was illegal and awarded claimant $100,000 damages for false imprisonment. Since claimant here only contests the adequacy of the award, we need not concern ourselves with

> the first and third causes of action. The State appeals from the judgment, contending that the claimant is not entitled to damages for the reason that he failed to demonstrate that he was sane for any period during his confinement. We agree."

The Court of Claims found against the State because the State allegedly, under the wrong State law, retained the claimant in its institution as an insane person who could not be safely released. The Court of Claims said that the State acted under sections 70 and 74 of the New York State Mental Hygiene Law in effect at that time when it should have done so under section 384 of the Correction law in existence at that time. The basic question for the New York appellate courts to consider was whether appellant proved that he was damaged by his continued commitment under the allegedly wrong law. If he failed to prove this, then his commitment under the wrong law was not the proximate cause of whatever damages he may have suffered. It was incumbent on appellant in the State court to show that he was damaged. To do so, the Court of Appeals stated he would have to prove that he was sane during some of the period he was in the State's institution. It should be noted that no Court found that claimant was sane during this period. The Court of Claims in its opinion said (25a-26a):

> "The burden of proof remains on the claimant to establish every element of his claim, including the claim that he was sane during all the time he was confined.
>
> * * *
>
> "The doctors who had claimant under their supervision found him to be psychotic.
>
> "On the proof before me, claimant has not established that he was sane during that period. Claimant, in this regard, has failed to sustain the burden of proof."

The sole question before the Court of Appeals was whether the reversal by the Appellate Division because there had been no proof that claimant had been sane during his period of stay in the institution was correct. The Court of Appeals in its

memorandum shows that this was the only question decided by it. The question of whether the act of the State in having claimant held in a State institution under a possibly wrong section of law had damaged him is not a Federal constitutional question and therefore there is no substantial constitutional question involved in this case. It follows therefore that the appeal should be dismissed.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED.

Dated: December 13, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

RUTH KESSLER TOCH
Solicitor General

JEREMIAH JOCHNOWITZ
Assistant Attorney General

Of Counsel